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UTAH BUSINESS INSURANCE COMPANY v. WORKERS COMPENSATION FUND : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH BUSINESS INSURANCE COMPANY, Defendant/Appellant. vs. WORKERS COMPENSATION FUND, Plaintiff/Appellee.	Case No. **2011-0744-SC** Civil No. 100914170

REPLY BRIEF OF APPELLANT UTAH BUSINESS INSURANCE COMPANY

Appeal from the Third Judicial District Court in and for Salt Lake County, Utah

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A. The overwhelming authority cited by UBIC dictates that the targeted tender rule be adopted.

The threshold question to be answered in this appeal is whether the targeted tender rule applies to the facts of this case.[1] No Utah court has ever decided the question of whether an insured, who is covered by two policies insuring a loss, may elect which of the insurers is to cover the loss. While this case is set against the factual backdrop of workers compensation, the question is one of broader insurance law. Several other states have confronted this issue and, contrary to the order that was entered in this case by the district court, have, on similar facts to this case, unanimously endorsed an insured's right to choose whether, and to whom, a claim should be tendered. This Court should do likewise.

In its simplest form, the targeted tender rule recognizes the common-sense approach to resolving disputes among multiple policies potentially insuring a loss. The rule grants an insured, as the contracting party with the insurers, and as the party paying the premiums, the right to determine who should pay a claim on its behalf. The result of the insured's election is a cost-sharing of the loss only among those policies to whom the insured tendered the claim and who are, therefore, legally obligated to pay the claim. This may include some, or in most instances, all of the insurers that could be potentially liable for the loss. However,

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[1] If the targeted tender rule is adopted, then all other issues related to this appeal are moot.

the insured has a paramount right to decide who should, and who should not, pay the claim. Legion Ins. Co. v. Empire Fire & Marine Ins. Co., 822 N.E.2d 1, 4-5 (Ill. 2004). Indeed, there is no one better positioned to make this determination that the insured. Once the insured makes its election, only then do the "other insurance" clauses, if any, determine how the loss should be allocated among those insurers obligated to pay the claim. See, e.g., John Burns Construction Co. v. Indiana Ins. Co., 727 N.E.2d 211, 217 (Ill. 2000).

Several facts in this case present a particularly strong case for adopting the targeted tender rule and reversing the district court's order: Pioneer was covered by two insurance policies at the time of Mr. Antone's industrial accident[2]; Pioneer tendered to one of these insurers (WCF) to satisfy its obligation to provide workers compensation insurance for its employees; Pioneer expressly refused to tender the claim to its other insurer (UBIC); and nothing in the insurance policies at issue prohibits targeted tender or requires that a claim be tendered. Pioneer had a paramount right to determine whether to tender Mr. Antone's claim to WCF, UBIC, or both. Consistent with this right, Pioneer only tendered the claim to WCF, which obligated WCF, and only WCF, to pay the claim. The presence of an "other insurance" clause does not permit WCF to forcibly tender the claim to UBIC, and trample the rights of its insured, Pioneer.

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[2] For purposes of targeted tender, UBIC accepts this position.

1. Tendering is the key, and Pioneer never tendered the claim.

The law from numerous states requires that notice of a claim be given by an insured to an insurer to trigger an insurer's obligation to defend/indemnify under the policy. See, e.g., Mutual of Enumclaw Ins. Co. v. USF Ins. Co., 191 P.3d 866, 873 (Wash. 2008) ("[A]n insurer cannot be expected to anticipate when or if an insured will make a claim for coverage; *the insured must affirmatively inform the insurer that its participation is desired.*) (emphasis added); Cargill, Inc. v. ACE American Ins. Co., 784 N.W.2d 341, 354 (Minn. 2010); Foster-Gardner, Inc. v. National Union Fire Ins Co., 18 Cal. 4th 857, 869, 77 Cal. Rptr. 2d 107 (1998); Hartford Accident and Indemnity Company v. Gulf Insurance Company, 776 F.2d 1380, 1383 (7th Cir. 1985); Casualty Indem. Exch. Ins. Co. v. Liberty Nat'l Fire Ins. Co., 902 F. Supp. 1235, 1239 (D. Mont. 1995); 14 Couch on Insurance § 200.40 (noting that the insured is required to tender a claim to all insurers which the insured wants to respond to the claim). Where an insured never provides notice of the claim to an insurer, and/or never tenders the claim, there is no obligation on the insurer to defend/indemnify the insured. See id.; see also Cellex Biosciences, Inc. v. St. Paul Fire & Marine Ins. Co., 537 N.W.2d 621, 623 (Minn. Ct. App. 1995) ("Tender is a condition precedent to creation of a duty to indemnify."); Solo Cup v. Federal Insurance Co., 619 F.2d 1178, 1183 (7th Cir. 1980); Cincinnati Cos. v. West Am. Ins. Co., 701 N.E.2d 499, 504 (Ill. 1998); Sharon Steel Corp. v. Aetna Cas. and Sur. Co., 931 P.2d 127, 137 (Utah 1997) (holding that contribution by one insurer from another is only permitted where the other insurer(s) had an equal legal

obligation to defend the insured yet failed to do so). These sound principles are at the heart of the targeted tender rule.

WCF does not cite any cases for the proposition that tendering a claim is an irrelevant and superfluous requirement, or that there exists in the law the concept of an implied, constructive, or de facto tender. Nevertheless, WCF seeks to avoid the undisputed facts regarding tender in this case by arguing that: (1) there is no tendering requirement for workers compensation claims – the insurer's coverage obligation is triggered regardless of whether it receives a tender of the claim; (2) notice of a claim by an injured worker to his/her employer, and the constructive notice that is implied thereby to the insurer, is the legal and functional equivalent of tendering a claim, and that no notice/tender of the claim by the employer to its insurer is required; and (3) notice by an injured employee to his/her employer immediately, irrevocably, and automatically triggers every potential insurer's duty to pay (subject to any defenses), regardless of the wishes of the insured or whether the claim has been specifically tendered to fewer than all potential insurers. However, these arguments are contradicted by the extensive case law cited herein and in UBIC's opening brief. See id. Tendering a claim does matter[3], and notice to the insurer, however minimal, is required to

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[3] The consequence of eliminating the notice/tender requirement obligates an insurance company to interfere with an insured's affairs, even where it has not been asked to do so. In other words, an insurer will be forced to inquire frequently of its insureds whether all claims have been reported, because the insurer will be liable for even unreported claims. With no consequences to the insured, claims could potentially go unreported for years (as occurred in this case), only to arise long after the fact, thereby prejudicing an insurer's ability to defend the claim. This result runs contrary to well-established case law. See, e.g., Hartford

trigger an insurer's obligation under the policy. See id. The fact that this is a workers compensation case does not alter this long-standing principle of insurance law.

The authority cited also demonstrates that an insured holding multiple policies potentially covering a loss has the right to tender a claim to some, or all, of its insurers. See, e.g., Mutual of Enumclaw, 191 P.3d at 873; Burns, 727 N.E.2d at 217. This is one of the benefits of having multiple policies insuring against the same type of loss. This is the right granted to an insured who has "overinsured" for a particular loss. Pioneer should not be stripped of its legally recognized rights and benefits.

2. Failing to tender a claim cannot be a breach of an insurance policy.

WCF's arguments regarding failing to tender as a breach of the workers compensation contract are nonsensical. Insurance policies of nearly all types impose an obligation on an insured to give timely notice of a claim – if a claim is going to be made – to allow the insurer to investigate the claim. Descriptions of the event, and the availability of any witnesses, only decrease as time passes. The notice requirement is, therefore, only for the benefit of the insurer. An insurer is never prejudiced if the insured never tenders the claim because no insurer has an incentive to force its insureds to make claims. Although the failure to timely tender a claim can give rise to additional defenses to payment of the claim, the failure to tender a claim is not a breach of the policy.

Accident and Indemnity, 776 F.2d at 1383 (citations omitted) ("an insurance company [should not be] required to intermeddle officiously where its services have not been requested.").

In this case, the requirement in the workers compensation policy that Pioneer notify UBIC regarding any potential claims is only a requirement if Pioneer is seeking to make a claim under the UBIC policy. Pioneer never did seek to make such a claim, and neither UBIC nor WCF can force Pioneer to tender the claim. Institute of London Underwriters v. Hartford Fire Insurance Company, 599 N.E.2d 1311, 1313 (Ill. Ct. App. 1992); Bituminous Casualty Corp. v. Royal Insurance Co. of America, 704 N.E.2d 74, 79 (Ill. 1998); Hartford Accident and Indemnity, 776 F.2d at 1383. Moreover, by failing to tender a claim to UBIC, but tendering the claim to WCF, Pioneer still satisfied its obligation to provide workers compensation insurance for its employees. See Utah Code Ann. § 34A-2-201 (2008). Therefore, targeted tender, even among multiple workers compensation insurance policies, is viable, and should be adopted.

3. The targeted tender rule frequently arises under circumstances where insurance is required. A workers compensation insurance scenario does not require a different result.

UBIC admits that the targeted tender rule has not been applied in any reported workers compensation case. However, neither the unique nature of this case, nor the statutory requirement that workers compensation insurance be maintained, changes the fact that the rule should be applied in this case. General liability insurance is statutorily required for contractors; homeowners insurance is contractually required for any home encumbered by a mortgage; and automobile insurance is statutorily required for all vehicle owners. Many of the cases cited in UBIC's opening brief apply the targeted tender rule under circumstances

where insurance was required for a construction project, though this does not distinguish them. That workers compensation insurance, as opposed to general liability insurance, is at issue in this case is irrelevant. No case has limited its holding to a particular type of insurance, and no such limitation is warranted given the policy justifications underpinning the targeted tender rule.

Consider the following example of how a targeted tender claim could (and likely does) arise in Utah:

> As a homeowner is pulling into his garage, he mistakenly presses the accelerator instead of the brake and crashes through the back wall of the garage into the living room. The homeowner recently purchased his home and he maintains homeowners insurance, which is contractually required by his mortgage lender. He also maintains automobile insurance, which is statutorily required in Utah, and contractually required by the automobile lender. Both the automobile and the homeowners policies have "other insurance" clauses.

Under these circumstances, the homeowner has the right to make a claim under the homeowners policy, the automobile policy, both policies, or neither policy.[4] Such is the case as both policies, subject to any limits on liability, can cover the loss. In addition, neither insurer can compel the other to pay absent a tender from the homeowner. In this regard, if the homeowner elects to pay for the claim personally, and does not tender a claim to either

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[4] Obviously, given the requirement for workers compensation insurance coverage, the "neither" option would not be available to an employer. However, the employer could still tender to either carrier, or both carriers, in a targeted tender situation, and still satisfy its obligation to provide workers compensation insurance for its employees.

insurer, neither insurer is required to pay. The argument is no different where the claim is tendered to fewer than all available insurers because liability is predicated upon tendering the claim. See, e.g., Mutual of Enumclaw, 191 P.3d at 873; Cellex Biosciences, 537 N.W.2d at 623; Hartford Accident and Indemnity, 776 F.2d at 1383; Foster-Gardner, 18 Cal. 4th at 869, 77 Cal. Rptr. 2d 107; Buss v. Superior Court, 16 Cal. 4th 35, 46, 65 Cal. Rptr. 2d 366 (1997). Only where the homeowner tenders to both insurers, which triggers the legal obligation of both insurers to pay, does the question of equitable contribution arise. See, e.g., Mutual of Enumclaw, 191 P.3d at 872 (citing Aetna Cas. & Sur. Co. v. Mut. of Enumclaw Ins. Co., 826 P.2d 1315 (Idaho 1992)). Absent a tender to multiple insurers, there cannot be a claim for equitable contribution. This is true for workers compensation policies as well as any other insurance policy.

In this case, like those cited herein, Pioneer was covered by two insurance policies. Pioneer made an affirmative election to direct coverage for the claim to one insurer – WCF. Pioneer's wishes should be respected. The targeted tender rule should be adopted.

4. WCF has no contractual right to equitable contribution (and no right to equitable contribution under any other theory).

WCF argues that by allowing targeted tender it would "strip WCF of its contractual right of equitable pro rata contribution from a co-insurer allowed by the 'other insurance' clause." See Response Brief, p. 41. WCF's broad conclusion is not supported by the facts

of this case or the law.[5]

Ordinarily, where an insured has concurrent coverage for the same liability, both of its insurers are obligated to provide coverage under the terms of their respective policies and their coverage obligations are then coordinated, typically by reference to the policies' "other insurance" provisions. However, "other insurance" clauses only affect insurers' rights among themselves; they do not affect the insured's right to selectively tender a claim to one insurer alone. See, e.g., Burns, 727 N.E.2d at 216-17.

The Illinois Supreme Court held that an insured has the exclusive right to determine whether to trigger coverage under an available policy by allowing the insured to make a targeted tender of its claim to one of several potential insurers, irrespective of the presence of an "other insurance" clause. Burns, 727 N.E.2d at 217; Bituminous, 704 N.E.2d 74. As stated by the Burns court:

> It is only when an insurer's policy is triggered that the insurer becomes liable for the defense and indemnity costs of a claim and it becomes necessary to allocate the loss among co-insurers. The loss will be allocated according to the terms of the "other

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[5] Aside from the principles of targeted tender that are contravened by WCF's argument, equitable contribution is never contractual – it is equity based. OneBeacon America Ins. Co. v. Fireman's Fund Ins. Co., 95 Cal. Rptr. 3d 808, 175 Cal. App. 4th 183, 204 (2009) ("The right of equitable contribution between insurers is not controlled by the contract between the insured and the insurer but by equitable principles"). Such is the case here because there isn't agreement to cost-share a loss between UBIC and WCF. Signal Cos., Inc. v. Harbor Ins. Co., 27 Cal. 3d 359, 369, 612 P.2d 889 (1980) ("The reciprocal rights and duties of several insurers who have covered the same event do not arise out of contract, for their agreements are not with each other.") (quoting Am. Auto. Ins. Co. v. Seaboard Sur. Co., 155 Cal. App. 2d 192, 195-96, 318 P.2d 84 (1957)).

> insurance" clauses, if any, *in the policies that have been triggered.*
>
> . . .
>
> An "other insurance" clause in a policy will not automatically reach into coverages provided under other policies merely because such other policies are in existence. *The insured still must be given the right to determine whether it wishes to invoke its rights to such other coverages before those coverages become accessible under the "other insurance" provision of a triggered policy.*
>
> . . .
>
> An "other insurance" provision does not in itself overcome the right of an insured to tender defense of an action to one insurer alone.

Burns, 727 N.E.2d at 216-217 (citations omitted) (emphasis added).

The targeted insurer has the sole responsibility to defend and indemnify the insured, thereby foreclosing a claim for equitable contribution from the excluded insurer. See id. An insurer does not have the right to trigger another insured's coverage under a separate policy in contravention of the insured's wishes. See id.

To allow WCF to forcibly tender the claim to UBIC and seek equitable contribution effectively transforms WCF into a third-party beneficiary of the UBIC-Pioneer contract.[6]

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[6] WCF denies that such is that case on the basis of the "other insurance" clause. However, numerous cases have rejected this same argument. See, e.g., Burns, 727 N.E.2d at 216-217; Institute of London Underwriters, 599 N.E.2d at 1315; Bituminous Casualty Corp., 704 N.E.2d at 79; Casualty Indem. Exch. Ins. Co., 902 F. Supp. 1235. See also 15 Couch on Insurance § 219:1; 219:9. Each of these cases concluded that an insured triggers an insurer's liability, not an "other insurance" clause.

This contravenes not only the expressed wishes of Pioneer (who did not want UBIC to get involved (see R. 346)), but also well-established case law. See, e.g., Benjamin v. Amica Mut. Ins. Co., 2006 UT 37, 140 P.3d 1210, 1213 (Utah 2006) ("An insurance policy is merely a contract between the insured and the insurer."); Bybee v. Abdulla, 2008 UT 35, 189 P.3d 40, 49 (2008) ("The benefits conferred by contracts are presumed to flow exclusively to the parties who sign the contracts.") (citing Tracy Collins Bank & Trust v. Dickamore, 652 P.2d 1314, 1315-16 (Utah 1982)); Casualty Indem. Exch. Ins. Co., 902 F. Supp. at 1239 fn. 4 (D. Mont. 1995) (citations omitted) (emphasis added); Maryland Cas. Co. v. W.R. Grace & Co., 218 F.3d 204, 210-211 (2d Cir. 2000); Bituminous Casualty Corp., 704 N.E.2d at 79; Cincinnati Cos., 701 N.E.2d 499; Mutual of Enumclaw, 191 P.3d at 872. Only under circumstances where the contract "clearly intended to confer a separate and distinct benefit upon the third party" can it be enforced by a third-party beneficiary. Broadwater v. Old Republic Sur., 854 P.2d 527, 536 (Utah 1993). No such circumstances exist in this case.

There is no agreement between UBIC and WCF to cost-share, nor is there any credible legal basis for anointing WCF a third-party beneficiary of the UBIC-Pioneer insurance contract. Pioneer exercised its paramount right not to tender the claim to UBIC. Without a tender of the claim, UBIC was never a "co-insurer" because only WCF was obligated to pay the claim. And, with no other insurer obligated to pay the claim, there is no other insurer with whom WCF can apportion the loss pursuant to the "other insurance" clause. See 15 Couch on Insurance § 219:1; 219:9. Simply put, there is no "other" insurance.

Additionally, Pioneer did not, as WCF argues, disclaim WCF's right to equitable contribution. A claim for equitable contribution requires that both parties share liability for a loss, and one party seeks to equalize payment in relation to liability. Casualty Indem. Exch. Ins. Co., 902 F. Supp. at 1237; Mutual of Enumclaw, 191 P.3d at 872; Sharon Steel, 931 P.2d at 137. The law in this regard is well settled. Equitable contribution claims among insurers arise "post-tender." If there is no tender, there is no duty to pay. Cellex Biosciences, 537 N.W.2d at 623. If there is no duty to pay, there is no basis for a claim of equitable contribution against the non-liable insurer. See, e.g., Casualty Indem. Exch. Ins. Co., 902 F. Supp. at 1237; Mutual of Enumclaw, 191 P.3d at 872; Sharon Steel, 931 P.2d at 137. It is an undisputed fact in this case that Pioneer never tendered, or even provided notice to UBIC, of its desire that UBIC pay the claim. In fact, Pioneer did exactly the opposite by instructing UBIC *not* to pay the claim. R. 346. Therefore, UBIC's obligation to pay was never triggered, and it never shared liability for the claim with WCF. There was never anything for Pioneer to disclaim.

The cases cited by WCF regarding targeted tender's applicability to this case do little to contradict the great weight of authority cited by UBIC. See Response Brief p. 47-48. In each case cited by WCF, the question presented to the court was whether there was a claim for equitable contribution. However, these claims arose post-tender after the insurer's liability to pay, subject to any defenses, was already established. For instance, in Underwriters of Lloyd's v. Massachusetts Bonding and Insurance Co., 230 P.3d 103 (Ore.

2010), the question presented was whether an insurer can settle a claim and thereby be relieved of any future claims for contribution based upon a release of liability signed by the insured. The court explained that claims for equitable contribution are not based upon subrogation or contract theory, but on principles of equity. Id. at 113. Unlike the case before this Court, in Underwriter's of Lloyd's each insurer was liable for the loss and the release was a post-tender attempt by the insurers, after having settled their claim with the insurer, to limit any future liability to other insurers. The issue of liability under the policy, such as whether the claim was tendered by the insured, was not at issue. Likewise, in American States Insurance Company v. National Fire Insurance Company of Hartford, Case No. D057673 (Cal. Ct. App. 2011), the question presented was whether the equitable contribution claim was time-barred by the applicable statute of limitations, or whether it could survive as a subrogation claim. There was no indication that the insured failed to tender to one of the insurers or that only one insurer was otherwise liable to pay the claim, subject to any defenses it might assert (e.g., the statute of limitations defense that was ultimately successful). These cases, therefore, have no bearing on the application of targeted tender in this case.

In this case, the question of equitable contribution is never reached because there is only one party obligated to pay – WCF. There is no other policy from which WCF can seek equitable contribution. UBIC was under no obligation to pay the claim because of Pioneer's

election not to tender the claim.[7] WCF's claim for equitable contribution must be denied and the order of the district court reversed.

5. Policy considerations weigh in favor of adopting the targeted tender rule.

UBIC agrees that there are strong policy considerations that underlie the workers compensation system. Perhaps chief among these is to assure injured workers that there is workers compensation insurance in place to administer and, if necessary, pay for valid claims. In fact, so strong are these policy considerations that insurance exists even for those employers that don't have insurance – such insurance being provided by the Uninsured Employers' Fund. These policy considerations are unaffected by the targeted tender rule.

WCF argues that adopting the targeted tender rule will put injured workers at risk of not having their benefits paid. However, WCF's fears regarding targeted tender are based upon a perceived ability by an insured to not tender to any carrier, leaving the injured worker without any insurer to pay benefits. Such an argument exposes WCF's misunderstanding with regard to the targeted tender rule in a workers compensation context. If a policyholder, such as Pioneer, elects, for whatever reason, either intentionally or unintentionally, to have

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[7] Clearly, if Pioneer only had one policy in place, there would be no opportunity for an election. Pioneer was only presented with a choice because it had multiple policies. Had Pioneer been insured by three insurers, but tendered to only two of them, an equitable contribution claim would exist among the two insurers to whom the claim was tendered, and the loss would be allocated pursuant to the "other insurance" clauses in those policies, if any. The insurers to whom the claim was tendered could not force the non-targeted insurer to share in the loss because the non-targeted insurer had no obligation to pay the claim. In addition, under these circumstances the "other insurance" clause would serve its intended purpose – apportioning the loss among those carriers liable to pay.

multiple workers compensation policies in place for a given time period, a targeted tender of a claim to one or both of these carriers in no way diminishes coverage for an injured worker. The consequences are felt only by the insurers. Such is the case as an employer with multiple policies insuring a single event must elect to tender the claim to one or both carriers. Failing to tender the claim to any carrier is not an option in Utah because of the statutory mandate that workers compensation coverage be in place. See Utah Code Ann. § 34A-2-201. Therefore, allowing an insured to make a targeted tender will never affect the rights of an injured worker because the claim will always be tendered to at least one carrier. There will never be any confusion regarding which insurer is to pay benefits because the insurer who was targeted will be required to pay (assuming there are not any other defenses to payment). Payments will be promptly made to the injured worker by the targeted insurer, and the subsequent litigation, if any, between insurers in targeted tender situations will always be focused on whether there is a claim for equitable contribution.

In this case, Pioneer paid the premiums for two policies, each of which is sufficient to cover all of Mr. Antone's claim. It should have the right to direct coverage among the two policies fully insuring the event. If the goal of the workers compensation system is to protect the injured worker, adopting the targeted tender rule does not, in any way, inhibit this goal.

In addition, the corruption and widespread calamity foreseen by WCF if the targeted tender rule is adopted represents misplaced fear mongering. The circumstances presented

by this case are very rare, and the lack of reported cases on the issue substantiates its infrequency. To underscore its rarity, WCF did not cite to one instance where it has been faced with a situation of dual coverage, and pursuant to an "other insurance" clause, was able to split a claim pro-rata. The reason for the absence of such a citation is because this situation rarely arises. It is very rare for an insured event to be covered by two policies; it is even more rare for an insured to have paid the premiums for two policies without receiving any additional coverage; and it is even more rare still for an insured to elect which insurer is to pay. Each policy in this case, standing alone, was sufficient to cover one hundred percent of Mr. Antone's injuries. In fact, because workers compensation policies are not subject to limits on liability, Pioneer, when it secured coverage through WCF, did not need any additional insurance; rather, it could have depended on WCF to cover, in full, any claim that was made. Adopting the targeted tender rule will not, as WCF claims, require an overhaul of the workers compensation system because to require WCF to pay Mr. Antone's claim is not requiring WCF to do any more than it was already contracted to do, and, more importantly, requested to do by Pioneer when it tendered the claim. To find otherwise would result in a windfall to WCF.

These targeted tender situations are also very rare because an insured rarely has a preference regarding which insurer pays a claim – they just want the claim paid. The result is that, nearly always, an insured will tender a claim to all available insurers, thereby triggering the "other insurance" clauses, if any, in the policies, and apportioning the loss

among all insurers required to pay. See 15 Couch on Insurance § 219:1; 219:9. Thus, by the very nature of the facts presented, the targeted tender rule will be limited to a very specific set of facts that arise very infrequently.

Moreover, there is nothing amiss about allowing an insured to choose to whom it wishes to tender a claim. In fact, courts have stated this is a "paramount right" held by the insured.[8] As noted by one court:

> When several insurance policies are available to the insured, that insured has the *paramount right* to choose or knowingly forego an insurer's participation in a claim. The insured may choose to forego an insurer's assistance for various reasons, including the insured's fear that premiums would increase or that the policy would be cancelled in the future. Moreover, an insured's ability to forego that assistance should be protected. . . . *When an insured has knowingly chosen to forego an insurer's assistance by instructing the insurer not to involve itself in the litigation, the insurer is relieved of its obligation to the insured with regard to that claim. The targeted insurer, then, has the sole responsibility to defend and indemnify the insured. That insurer may not seek equitable contribution from the other insurers that were not designated by the insured.*

Legion Ins. Co., 822 N.E.2d at 4-5 (citations omitted) (emphasis added). The wishes of the

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[8] Understandably, the subcontractors, who were typically at the epicenter of the targeted tender decisions in other states, did not want to tender to their own insurers, but to another insurance carrier insuring the project. The courts that have adopted/applied the targeted tender rule have recognized the financial benefits the insured would reap, such as avoiding an increase in premium or cancellation of its policy, if targeted tender is permitted. Nevertheless, in each instance, the wishes of the insured were respected and the targeted tender was allowed. There is no evidence in any of these cases that the choice among insurance carriers affected the benefits paid, only the insurer obligated to pay them.

insured should be respected.[9]

The numerous cases cited by UBIC demonstrate that the legal underpinnings of the targeted tender rule are commonly-accepted doctrines. When presented with an opportunity to review and evaluate a targeted tender situation, the targeted tender rule has been very nearly unanimously accepted by those courts considering the issue. As the party purchasing the insurance, the insured should have the right to determine whether, and to whom, a claim should be tendered. Relatedly, no insurer should be forced to pay a claim against the express wishes of its own insured. The targeted tender rule should be adopted in Utah and the judgment of the district court reversed.

B. If the targeted tender rule is not adopted, the case should be remanded for further discovery.

Aside from the efficiency of resolving cases quickly, an important component of Utah R. Civ. P. 56 is to ensure that diligent efforts to conduct discovery are not prematurely ended by the entry of summary judgment. Brown v. Glover, 16 P.3d 540 (Utah 2000) (citing Price Dev. Co., L.P. v. Orem City, 2000 UT 26, ¶ 30, 995 P.2d 1237 (2000)); Strand v. Associated Students of the University of Utah, 561 P.2d 191, 194 (Utah 1977); see also 10B Charles

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[9] There are numerous reasons why Pioneer might elect to tender the claim only to WCF. One particular reason could be that, like any insured, Pioneer is concerned about its insurance premiums. Because of the way in which premiums are calculated, which is a function of an employer's experience modification factor, a tender to both WCF and UBIC would negatively impact Pioneer's premiums for a longer period of time than if the claim is tendered only to WCF. The long-term negative impact of the forced tender to both carriers is unpalatable in light of Pioneer's expressed desire.

Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil § 2740 (3d ed. 1998) ("The purpose of [Rule 56(f)] is to provide an additional safeguard against an improvident or premature grant of summary judgment . . . and [the rule] should be applied with a spirit of liberality."); Utah R. Civ. P. 56(f). It seeks to prevent what is colloquially deemed "a rush to judgment."[10] Not surprisingly, with an entry of judgment already in its favor, WCF believes that no further discovery is necessary. However, additional factual discovery clearly is necessary in this case to resolve the factual issue of intent.

Intent is always a complicated and difficult factual issue to resolve, particularly on summary judgment. For this reason it often results in a reversal where discovery was not completed. See, e.g., West One Trust Company v. Morrison, 861 P.2d 1058, 1062 (Utah Ct. App. 1993) ("A motion for summary judgment may not be granted if . . . there is a factual issue as to what the parties intended.") (quoting Winegar v. Froerer Corp., 813 P.2d 104, 108 (Utah 1991)).

Intent is particularly important in the context of insurance policies. "The intent and understanding of the parties to an insurance contract is far more important than the strict and literal sense of the words used in the contract; thus, it is equally important to consider the

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[10] This is precisely what happened in this case. In fact, WCF filed its motion for summary judgment prior to even answering UBIC's first set of written discovery. No depositions were ever taken. Few cases are so clear factually that little or no discovery is required, and this case is certainly not one of them.

subject matter of the insurance and the subject or object which the parties had in view at that time." See Couch on Insurance § 22:7. Couch continues: "it is often considered proper to consider the business of the parties, the circumstances surrounding the making of the contract, the situation of the property, and all other conditions which have a legitimate bearing on the parties' intention." Id. "Mistake" for purposes of an insurance contract has been held to be a belief which is not consistent with the facts surrounding the risk and/or issuance of the policy. See Couch on Insurance § 27:2. Where an insurance policy does not reflect the parties' intent, the source of the mistake is irrelevant. See, e.g., Couch on Insurance § 26:1 (citing St. Louis County Nat. Bank v. Maryland Cas. Co., 564 S.W.2d 920 (Mo. Ct. App. 1978)).

Prior to the entry of summary judgment by the district court, UBIC did not have the opportunity to show, aside from providing affidavits, that there was a dispute regarding intent. The evidence provided – the Declaration of John Stout – makes it clear that Pioneer did not intend the two policies to overlap.[11] This declaration created a material issue of fact that was improperly disregarded by the district court. It provides clear evidence of Pioneer's intent at the time it sought to find a new workers compensation carrier. The declaration withstands scrutiny, particularly for purposes of summary judgment, because Pioneer is not

[11] There is no benefit to a insured to double-insure for workers compensation. While "other insurance" clauses make sense in the context where there are other insurance policies that could provide additional or excess coverage, workers compensation does not foster a need for these other policies. Compensable claims are fully covered by the insurer.

a party to this litigation and does not stand to benefit significantly from this litigation. Moreover, if WCF believes Mr. Stout was being untruthful in any way, WCF could have deposed Mr. Stout prior to filing its motion for summary judgment.[12] WCF could also have contacted Mr. Stout, who is not a party to this litigation, to discuss the contents of the declaration or his October of 2010 letter if they believed there was anything untruthful. WCF did not do so. The result is that the declaration and statements of Mr. Stout are unopposed and must be accepted as true for purposes of the motion for summary judgment. The trial court clearly ignored these facts in rendering its decision. It was also premature by the district court to determine that UBIC could not, under any circumstances, prove its defenses when so little time had been given to conduct discovery.[13] See, e.g., Warner v. Sirstins, 838 P.2d 666, 669 (Utah Ct. App. 1992) (quoting Robert Langston Ltd. v. McQuarrie, 741 P.2d 554, 557 (Utah Ct. App. 1987)); Grahn v. Gregory, 800 P.2d 320, 327 n. 8 (Utah Ct. App.

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[12] The lack of discovery in this case has allowed WCF to run wild with assumptions, theories, and unfounded allegations that are based upon little more than conjecture. It is unfortunate that summary judgment was granted on such a meager factual record when material questions of fact abound. One deposition – the deposition of Mr. Stout – would likely have resolved many of the factual issues that continue to plague this case. While UBIC does not deny that the original policy has an inception date of February 22, 2008, this is explained by the statements of Mr. Stout. Both WCF and UBIC dispute the effect of these two facts – hence the factual dispute that was ignored by the district court. There are no other facts to which WCF can cite to explain what happened in February of 2008. The result is that WCF's brief is littered with the opinions and beliefs of WCF. Additional discovery is the only way to resolve this factual dispute.

[13] The focus has been on the intent of Mr. Stout; however, the stifled discovery period also did not allow for the deposition to be taken of the broker of the policy with whom Mr. Stout met.

1990); Mabey v. Kay Peterson Constr. Co., 682 P.2d 287, 290 (Utah 1984); Jensen v. Manila Corp. of the Church of Jesus Christ of Latter-Day Saints, 565 P.2d 63, 64 (Utah 1977) (citing Sine v. Harper, 118 Utah 415, 429, 222 P.2d 571, 578-79 (1950)); Salt Lake County v. Western Dairymen Coop., Inc., 2002 UT 39, 48 P.3d 910 (2002).

Once this case is remanded and the parties are permitted to finish discovery, the testimony of Mr. Stout is admissible to explain intent. Utah courts have repeatedly explained that parol evidence is admissible to show intent in the context of mutual mistake. As summarized by the Utah Court of Appeals:

> ***[P]arol evidence may be admissible to show mutual mistake, occurring " 'when both parties, at the time of contracting, share a misconception about a basic assumption or vital fact upon which they based their bargain.' "*** Warner v. Sirstins, 838 P.2d 666, 669 (Utah App. 1992) (quoting Robert Langston Ltd. v. McQuarrie, 741 P.2d 554, 557 (Utah App.) cert. denied, 765 P.2d 1277 (Utah 1987)).

West One, 861 P.2d 1058 at (emphasis added). Whether Mr. Stout's testimony, along with others, will be sufficient to show mutual mistake at trial is not known. What is clear is that it was reversible error for the district court to find that there were no circumstances under which UBIC could prove its defense of mutual mistake.

The question of mutual mistake is factual in nature. Despite its material and disputed nature, the district court granted summary judgment in favor of WCF without allowing UBIC the chance to conduct any depositions or conduct additional written discovery regarding the

intent of the parties to the policy. Such a conclusion by the district court was improper, and the district court's order should be reversed to allow this factual issue to be decided.

II.

CONCLUSION

As demonstrated above, as well as in UBIC's opening brief, the targeted tender rule is not, as WCF claims, some obscure, minority position. While the facts giving rise to a targeted tender situation are rare, those courts that have considered it have nearly unanimously adopted it. The rule recognizes that the insured, who purchased the policies, has the right to determine whether to make a claim under these policies. It is illogical that an insurer should have greater rights than an insured, and nonsensical that another insurer, who is not even a party to the insurance contact, can force another insurer to pay a claim against the express wishes of the insured. The rule also recognizes that where there are no other policies required to pay, because of the election of the insured, there cannot be a claim for equitable contribution. There is no liability on an insurer to pay unless, and until, requested by the insured. Another insurer cannot trigger this liability.

In this case, the facts are clear with regard to targeted tender. The claim of Mr. Antone was tendered by Pioneer to WCF. WCF paid benefits to Mr. Antone consistent with its policy, and which it was liable to pay once the claim was tendered to it by Pioneer. However, the claim was never tendered by Pioneer to UBIC. This fact is undisputed. UBIC, therefore, has no liability to pay. The wishes of Pioneer should be upheld, and the targeted

tender rule should be adopted in Utah. The order of the district court should be reversed and judgment entered in favor of UBIC.

While the facts are clear with regard to targeted tender, the facts are vehemently contested regarding mutual mistake. Despite the obvious factual dispute, and the very minimal discovery that was conducted in this case, the district court granted WCF's premature motion for partial summary judgment. However, despite the purportedly unambiguous nature of the UBIC policy, parol evidence is admissible under Utah law to explain the intent of the parties with regard to that policy. UBIC requests that if targeted tender is not adopted in Utah, that the order of the district court be reversed and the case be remanded so that UBIC may conduct the additional discovery it was prevented from conducting by the prematurely and improperly granted motion for summary judgment.

Respectfully submitted this 10th day of February, 2012.

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CERTIFICATE OF COMPLIANCE

Pursuant to Utah R. App. P. 24(f)(1), I hereby certify that this brief complies with the type-volume limitation. Excluding those parts of the brief exempted by Rule 24(f)(1)(B), this brief contains 6994 words.

DATED this 10th day of February, 2012.

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CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing document were hand delivered on the 10th day of February, 2012 to:

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